RECORD AND BRIEFS

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Supreme Court, U.S.
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In The
Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI SUBMITTED BY NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.

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QUESTION PRESENTED

In September 2013, the United States Court of Appeals for the Third Circuit upheld the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701 *et seq.*, against a constitutional commandeering challenge by construing its proscription against States "authoriz[ing]" sports wagering "by law" as a narrow prohibition reaching only the "affirmative 'authorization by law' of gambling schemes," and not repeals by States of sports wagering prohibitions. See *Nat'l Collegiate Athletic Ass'n* v. *Gov. of N.J.* (*Christie I*), 730 F.3d 218, 233 (3d Cir. 2013). However, after New Jersey repealed certain of its prohibitions on sports wagering as applied to specific venues in the State, the *en banc* Court reversed course and broadly interpreted PASPA as making it "unlawful" for New Jersey to enact such a repeal. The Court further held that it was constitutional for federal law to dictate in this manner the extent to which States prohibit sports wagering.

The question presented is:

Does a federal statute that prohibits adjustment or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997)?

PARTIES TO THE PROCEEDING

Petitioner New Jersey Thoroughbred Horsemen's Association, Inc. (NJTHA) was a defendant in the district court and an appellant below.

Respondents National Collegiate Athletic Association (NCAA), National Basketball Association (NBA), National Football League (NFL), National Hockey League (NHL) and Office of the Commissioner of Baseball (MLB) (collectively, the "Leagues") were plaintiffs and appellees below.

Christopher J. Christie, Governor of the State of New Jersey, David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement, and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission, (collectively, the "State Defendants") were defendants and appellants below and are filing a separate petition for a writ of certiorari.

Stephen M. Sweeney, President of the New Jersey Senate, and Vincent Prieto, Speaker of the New Jersey General Assembly, were intervenors-defendants in the district court and appellants below.

The New Jersey Sports and Exposition Authority was a defendant in the district court but did not participate in the appeal.

The United States of America participated as an *amicus curiae* in the proceedings below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in New Jersey Thoroughbred Horsemen's Association, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner NJTHA respectfully petitions for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Third Circuit.

Defining "the conflicting powers of the government of the Union and of its members, as marked in that constitution," has always been acknowledged to be this Court's important constitutional duty. *M'Culloch* v. *Maryland*, 17 U.S. 316, 400-401 (1819); *id.* at 400-401 (noting that "[o]n the Supreme Court of the United States has the constitution of our country devolved this important duty"). In the decision below, however, the court of appeals failed to follow this Court's modern Tenth Amendment and federalism precedents established in *New York* v. *United States*, 505 U.S. 144 (1992), *Printz* v. *United States*, 521 U.S. 898 (1997), and *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012).

OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals are not yet published but are available at ___ F.3d ___, 2016 WL 4191891 (3d Cir. Aug. 9, 2016) and reproduced at Pet. Appx. A.[1] The majority and dissenting opinions of the three-judge panel of the court of appeals is reported at 799 F.3d 259 (3d

[1] References to "Pet. Appx." are to the Appendix of the Petition for Writ of Certiorari filed by the State Defendants in connection with the same August 9, 2016 judgment as this Petition.

Cir. 2015) and reproduced at Pet. Appx. C. The opinion of the district court granting summary judgment to the Leagues that was affirmed by the court of appeals is reported at 61 F.Supp.3d 488 and reproduced at Pet. Appx. D. The majority and dissenting opinions of the three-judge panel of the court of appeals in an earlier round of litigation involving these issues and parties is reported at 730 F.3d 218 (3d Cir. 2013) and reproduced at Pet. Appx. F.

JURISDICTION

The court of appeals entered its opinion on August 9, 2016 after *en banc* rehearing. An amended opinion was issued on August 11, 2016 to reflect that Judge Restrepo joined Judge Fuentes's dissent. That amendment did not affect the original filing date of the judgment on August 9, 2016. See Pet. Appx. B. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT UNDER RULE 29.4(b)

Inasmuch as the constitutionality of an Act of Congress – PASPA – is drawn into question, and the United States participated as an *amicus curiae*, but not as a party, in the proceedings below, 28 U.S.C. 2403(a) may apply.

In an earlier round of litigation involving these issues and parties (*Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 12-4947 (D.N.J.)), the district court certified to the Attorney General the fact that the constitutionality of PASPA has been drawn into question. The United States intervened pursuant to 28 U.S.C. 2403 in that earlier action, and, as set forth above, participated as an *amicus curiae* in the proceedings below in this action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

U.S. Const. Art. I, § 8, Cl. 3.

The Supremacy Clause of the United States Constitution provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

> Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, Cl. 2.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X.

The most relevant provision of PASPA (28 U.S.C. 3702) provides in pertinent part:

> It shall be unlawful for –
>
> (1) a governmental entity to * * * license, or authorize by law or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate * * * or on one or more performances of such athletes in such games.

The full text of PASPA, 28 U.S.C. 3701 *et seq.*, is reproduced at Pet. Appx. H.

New Jersey's law repealing certain of its laws prohibiting sports betting at specific venues in the State,

N.J. Stat. Ann. §§ 5:12A-7 *et seq.* ("2014 Act"), is reproduced at Pet. Appx. H.

STATEMENT OF THE CASE

The NJTHA adopts and incorporates by reference the entirety of the Statement of the Case of the State Defendants that is set forth in their Petition for Writ of Certiorari filed on or about this date in connection with the same August 9, 2016 judgment as this Petition. To that Statement of the Case, the NJTHA respectfully adds the following.

The NJTHA has more than 3,000 members, consisting of thoroughbred horse owners and horse trainers from around the world. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, Docket Entry ("D.E.") 21-8 ¶23 (D.N.J. Dec. 13, 2012).[2] The NJTHA is also the licensed operator and permit holder of Monmouth Park Racetrack, a thoroughbred racetrack located in Oceanport, New Jersey ("Monmouth Park"). *Id.* ¶24.

Thoroughbred racing in New Jersey provides substantial economic and other benefits to the general public, creates employment opportunities for thousands of people, and generates substantial revenues for the State of New Jersey. *Id.* ¶29.

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[2] The record in this case is electronic. D.E. refers to the docket entry number on the district court's electronic case files (ECF) docket.

Monmouth Park is an integral part of all aspects of the equine industry in New Jersey. *Id.* ¶30. If Monmouth Park is forced to close it will mean the death of the thoroughbred racing industry in New Jersey. *Id.* ¶31.

Wagering on New Jersey Thoroughbred and Standardbred horse races in New Jersey has waned in recent years resulting in the loss of jobs as well as causing economic distress to the equine industry in New Jersey, especially to Monmouth Park. *Id.* ¶32. The NJTHA believes that sports betting is an essential component of the NJTHA's overall plan to make Monmouth Park an economically self-sustaining Thoroughbred Racetrack, better able to compete with racetracks in surrounding States that are bolstered by casino revenues. *Id.* ¶33.

The New Jersey equine industry is critical to New Jersey's economy and the preservation of open space in New Jersey. *Id.* ¶34. In a Report, prepared by Karyn Malinowski, Ph.D. of the Rutgers Equine Science Center, it was concluded that if racing-related and breeding farms in New Jersey were to cease operations it would have a $780 million negative annual impact, put 7,000 jobs in danger, eliminate $110 million in tax revenues, and leave over 163,000 acres of open space vulnerable to future development. *Id.*

The competitive disadvantages created by PASPA's exemption, in favor of four (4) States (especially Nevada and neighboring Delaware), from PASPA's prohibition against State authorized "by law" sports wagering has

combined with other factors to put the New Jersey horse industry, and Monmouth Park in particular, at such a severe disadvantage that the economic viability of the New Jersey horse industry and Monmouth Park has been and continues to be seriously damaged. *Id.* ¶35.

The only business revenue stream that can save Monmouth Park at the present time is revenue from sports betting. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 21-9 ¶5 (D.N.J. Oct. 22, 2014). In anticipation of being able to offer sports betting in New Jersey, the NJTHA entered into an agreement with the leading sports betting company in the world, William Hill. *Id.* ¶6 and Ex. A.

Monmouth Park, through the NJTHA, is the founding member of a private regulatory body called The Independent Sports Wagering Association ("TISWA"). *Id.* ¶7; *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 21-3 (D.N.J. Oct. 13, 2014). TISWA is designed to provide integrity and protect the public with respect to sports betting. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 21-9 ¶7 (D.N.J. Oct. 22, 2014).

Monmouth Park estimates that it is losing over one million dollars every week because of its inability to offer sports betting due to the Third Circuit's judgment regarding the 2014 Act. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 21-11 ¶5 and Ex. A (D.N.J. Oct. 22, 2014).

While Monmouth Park suffers this significant injury, the Leagues continue to reap enormous profits on daily fantasy sports – wagering based on the performances of players in the Leagues' sports contests – where the Leagues are actively promoting such betting and/or owning daily fantasy betting platforms that are now authorized by law in numerous states despite the fact that PASPA may prohibit daily fantasy wagering. See *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 53 (D.N.J. Nov. 17, 2014); D.E. 53-2 (D.N.J. Nov. 14, 2014); D.E. 53-3 (D.N.J. Nov. 13, 2014).

REASONS FOR GRANTING THE WRIT

The NJTHA adopts and incorporates by reference the entirety of the Reasons for Granting the Petition of the State Defendants that is set forth in their Petition for Writ of Certiorari filed on or about this date in connection with the same August 9, 2016 judgment as this Petition. To those Reasons for Granting the Petition, the NJTHA respectfully adds the following.

A. The Third Circuit's Flouting Of This Court's Anti-Commandeering Precedents Deprives The NJTHA And The People Of New Jersey Of The Political And Individual Liberties That Federalism Is Designed To Protect.

The Petition for Certiorari filed by the State Defendants – which the NJTHA fully supports and incorporates by reference – demonstrates that the Court of

Appeals flouted this Court's anti-commandeering precedents by requiring the State of New Jersey to keep in place criminal prohibitions that the State has chosen to lift.

While the State of New Jersey correctly objects to this violation of its sovereignty, our federalism does not merely protect the States, but also "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York* v. *United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). The liberties protected by federalism are both political and individual.

Politically, federalism "allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). Individually, federalism "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* at 221-222. These are not abstract matters for the NJTHA and its more than 3,000 members, which find themselves deprived by the Third Circuit's decision of both their political and individual liberties.

The NJTHA operates Monmouth Park Racetrack, a New Jersey institution since 1870 and an integral part of all aspects of the State's tourist and equine

industry. Foreseeing that Monmouth Park's economic survival depends on sports wagering, and that its closure would endanger the entire equine industry in New Jersey (including thousands of jobs and thousands of acres of open space), the NJTHA joined with citizens across New Jersey to change the state law prohibiting sports betting. It did so not once, but twice – the second time in reliance on the assurances that the Third Circuit, the Leagues, and the United States provided to explain their rejection of NJTHA's first efforts. These exercises of political liberty have been nullified because the Third Circuit reversed course and held that the content of New Jersey law can be dictated by the national government, in derogation of the will of the people of New Jersey and their elected representatives.

Monmouth Park is not free to offer sports wagering to its customers. And Monmouth Park's customers are not free to engage in sports wagering. Why? Not because the Congress of the United States has exercised its power to regulate interstate commerce to directly prohibit Monmouth Park and its customers from engaging in sports betting. Congress has passed no federal law that directly prohibits sports betting at Monmouth Park. And not because the Legislature of New Jersey has exercised its police power to prohibit that activity. To the contrary, the State Legislature has repealed the prior state law prohibiting sports betting at Monmouth Park.

Monmouth Park and its customers are not free to engage in sports betting because federal judges have

decreed that the prior State law prohibition against sports betting must remain in place as New Jersey law, despite an Act of the New Jersey Legislature repealing that prohibition. Thus, if the NJTHA offered sports wagering at Monmouth Park, it would face the risk of prosecution by New Jersey State officials, in a New Jersey State court, for a violation of New Jersey State law – not because of decisions made by the New Jersey Legislature and Executive, but because State officials are under a federal injunction not to give effect to the State Legislature's repeal of State law.

The NJTHA would find itself defending a charge that it violated a State law that remained State law only because of a federal compulsion in the form of a federal injunction, and prosecuted by State executives forced to prosecute only because of a federal injunction. Such commandeering of State law conflicts with *New York* v. *United States*, 505 U.S. 144 (1992), and such conscription of State law enforcement officials to carry out a federal mandate violates *Printz* v. *United States*, 521 U.S. 898 (1997). Each violation results in the unconstitutional deprivation of the political and individual liberties protected by our federalism.

In conflict with the Third Circuit's decision, the highest courts in several States have recognized that the national government lacks the constitutional authority to require States to freeze in place State law prohibitions. *Reed-Kaliher* v. *Hoggatt*, 347 P.3d 136, 141 (Ariz. 2015); *Ter Beek* v. *City of Wyoming*, 846 N.W.2d 531, 538 (Mich. 2014); *State* v. *Nelson*, 195 P.3d 826, 834 (Mont. 2008). In these decisions, the Supreme

Court of Arizona, the Supreme Court of Michigan, and the Supreme Court of Montana each relied on anti-commandeering principles to uphold the validity of State laws removing, for qualified patients, prior State law prohibitions of marijuana. See also *Conant* v. *Walters*, 309 F.3d 629, 645-646 (9th Cir. 2002) (Kozinski, J., concurring) ("much as the federal government may prefer that California keep medical marijuana illegal, it cannot force the state to do so. . . . If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal.").

Under the Third Circuit's interpretation of the United States Constitution, all of these State Court decisions are wrong. Under the Third Circuit's reasoning, Congress has the constitutional power to prohibit States from selectively removing State law prohibitions on private conduct. The Third Circuit, unlike those State Courts, failed to recognize that while State law cannot create a defense to a federal prosecution, a State remains free to prohibit as little private conduct as it chooses under its own law.

This Court alone can make the Constitution uniform across the nation. *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 348 (1816) (noting that without this Court's appellate jurisdiction "the constitution of the United States would be different in different states," producing "truly deplorable" "public mischiefs"). The Third Circuit failed to see that the Constitution, properly

interpreted, leaves the people of New Jersey as free to exercise their liberties and partially remove New Jersey's prior State law prohibiting sports gambling as it leaves the people of Arizona, Michigan, and Montana free to partially remove their prior State law prohibitions on marijuana.

This Court should grant certiorari and make this promise of liberty-enhancing federalism uniform throughout the country.

B. The Third Circuit's Decision Has Nationwide Significance Because It Casts A Long Shadow Over Numerous State Laws And Regulations Authorizing Daily "Fantasy" Sports Wagering.

The Petition for Certiorari filed by the State Defendants references the many States that have expressed interest in repealing their prohibitions on sports wagering. The Third Circuit's decision upholding PASPA and interpreting it in a manner that prevents selective repeals of State laws prohibiting sports betting impacts the efforts of these States.

The Third Circuit's decision also calls into question the laws and regulations of numerous States that have enacted regimes regulating daily fantasy sports betting. Daily fantasy sports betting ("DFS") involves wagering on performances by players in the Leagues' games as opposed to betting on the final scores of the Leagues' games. The two industry leaders in DFS, FanDuel and DraftKings, processed a combined $3 billion

in fees in connection with such games.[3] There are currently nine states that have laws authorizing daily fantasy wagering on athletic performances – New York, Massachusetts, Virginia, Colorado, Kansas, Missouri, Tennessee, Mississippi, and Indiana.[4]

The provisions of PASPA apply both to wagering on the outcome of sports games as well as wagering on the performances of the athletes in such games. See 28 U.S.C. 3702 ("It shall be unlawful for a governmental entity to * * * license, or authorize by law * * * , or a person to sponsor, operate, advertise, or promote, pursuant to the law * * * of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate * * * *or on one or more performances of such athletes in such games*.") (emphasis added).[5] Accordingly, all

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[3] See Don Van Natta, Jr., *Welcome to the Big Time*, Outside the Lines and ESPN Magazine (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel.

[4] See Legislative Tracker: Daily Fantasy Sports, Sports Betting, http://www.legalsportsreport.com/dfs-bill-tracker/ (last visited September 29, 2016). In addition, twenty-four other states have introduced legislation in this area, though in many of those states that legislation has failed or is on hold. *Id.*

[5] To be sure, the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. 5361 *et seq.*, contains an exclusion for fantasy sports (under certain circumstances) from the prohibitions thereunder. 31 U.S.C. 5362(1)(E)(ix). But the UIGEA explicitly states that "[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law * * * prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. 5361(b). Thus, the UIGEA

States that are currently licensing or authorizing "by law" daily fantasy sports (as well as the DFS operators in those States) are, under the Third Circuit's decision, at some risk under PASPA.

The Third Circuit's decision creates uncertainty as to whether the efforts of the numerous States that have licensed and/or authorized DFS by law may violate PASPA. A determination by this Court as to whether PASPA is constitutional or not eliminates that uncertainty across the nation. Whether PASPA is a constitutional statute should not be left in the hands of the Leagues. They have already shown that they seek to enforce PASPA only when it suits their economic interests. It is emphatically the province of this Court, not the Leagues, to decide whether PASPA is constitutional or not. See *Marbury* v. *Madison*, 5 U.S. 137 (1803). Under PASPA, the only entities that have the authority to commence suit to enjoin a violation of PASPA are the United States and the "sports organization whose competitive game is alleged to be the basis of such violation." 28 U.S.C. 3703. As evidenced by this action, the United States is not independently seeking to enforce PASPA.[6] And the Leagues have no interest in seeking to enforce PASPA with respect to

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provides no immunity to suits under state law or other federal laws, such as PASPA.

[6] In *Christie I*, the Leagues commenced suit and the United States intervened pursuant to 28 U.S.C. 2403. In *Christie II*, the Leagues commenced suit and the United States decided not to intervene, though they did submit to the District Court a Statement of Interest. See *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 57 (D.N.J. Nov. 19, 2014).

DFS because the Leagues are significantly involved in DFS – indeed, the Leagues have equity stakes in DFS operators such as FanDuel and DraftKings.[7]

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[7] See Dustin Gouker, *If New Jersey Really Wants to Challenge the Sports Betting Ban, Daily Fantasy Sports is the Answer*, Legal Sports Report (Aug. 30, 2016), http://www.legalsportsreport.com/11255/nj-sports-betting-legal-challenge-via-dfs/ ("There's a reason why the Leagues won't challenge the DFS laws. Three of them (NBA, NHL, Major League Baseball) have equity in either DraftKings or FanDuel. Nearly every NFL team also has a deal with one of the two DFS operators."). Even the NCAA is involved in DFS. "The Pac-12 Network and Big Ten Network, which are fully or jointly owned by the conferences and their universities, still air daily fantasy ads, although not ones that promote college games." Marc Tracy, *NCAA Distances Itself from Daily Fantasy Websites*, New York Times (Oct. 20, 2015), http://www.nytimes.com/2015/10/21/sports/ncaa-distances-itself-from-daily-fantasy-websites.html?_r=0. See generally *Nat'l Collegiate Athletic Ass'n* v. *Christie*, No. 14-6450, D.E. 53 (D.N.J. Nov. 17, 2014); D.E. 53-2 (D.N.J. Nov. 14, 2014); D.E. 53-3 (D.N.J. Nov. 13, 2014).

The NJTHA argued below that the Leagues should be estopped by the doctrine of unclean hands from seeking relief under PASPA based, in part, on the Leagues' significant involvement and equity interest in DFS and the fact that if sports betting on the Leagues' games somehow causes irreparable injury to the integrity or the appearance of the integrity of such games then *a fortiori* daily fantasy games where each individual performance is at issue would cause irreparable injury. The NJTHA, however, was prevented in taking any discovery on this issue because the District Court consolidated the Leagues' request for a preliminary injunction with a decision on the merits. The District Court, which issued an injunction against the State Defendants, held that "it is unnecessary for the Court to determine the validity of the NJTHA's assertion of unclean hands" because "no injunction is being entered against the NJTHA." Pet. Appx. D at 83a n.7.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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